IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.22 OF 2004

Pandurang Ganpati Suryavanshi ... Petitioner

v/s

Dattatraya G. Suryavanshi and others ... Respondents

Ms Gauri Godse for Petitioner.

Mr R.S. Apte for Respondent Nos.37, 38 and 47(3).

CORAM : D.K. DESHMUKH J.

DATE : 15TH JUNE 2005.

P.C. :-

1. Rule, returnable forthwith. Heard finally by consent of parties.

2. For deciding this petition, presence of all the respondents is not necessary. The presence of original defendant Nos.38, 39 and 47(3) is necessary. Mr Apte, who appears for respondent Nos.37, 38 and 45(3) states that parties who are respondents, were applicants in the application which has been allowed by the order impugned in this petition. The original defendant Nos.38, 39 and 47(3), who are hereinafter referred to as applicants, made an application before the executing court that the decree which is put in for execution being a decree for partition and separate possession, is a nullity and non-executable decree because during the pendency of the suit, the defendant Nos.3, 12 and 41 have died and their legal representatives were not brought on record by the plaintiff. The Court, by impugned order, has accepted this plea and has held that since the legal representatives of defendant Nos.3, 12 and 41, who died during the pendency of the suit, were not brought on record, the decree passed in the suit is a nullity. The order obviously is incorrect. If the

plaintiff does not bring the legal representatives of defendant Nos.3, 12 and 41 who died during the pendency of the suit on record, the suit as against them would abate and therefore, the decree that is passed in the suit would not bind the legal representatives of defendant Nos.3, 12 and 41 and therefore, it is only the legal representatives of defendant Nos.3, 12 and 41, in case the decree holder seeks execution of the decree, would be entitled to claim that the decree is not binding on them, it being a nullity in the eyes of law. But other defendants like applicants who were duly served would not be entitled to take that plea. The decree as against them would be valid. In this situation, the only remedy available to them is to challenge the decree on the ground that the defendant Nos.3, 12 and 41 were necessary parties to the suit and therefore the Court could not have passed the decree in their absence but that objection does not render the decree as nullity so as to entitle the applicants to challenge the execution on that ground. The legitimate forum would be to prefer appeal against the decree. Taking overall view of the matter therefore, in my opinion, the executing court has committed a grave error of law in allowing the application filed by the applicants. In the result therefore, petition succeeds and is allowed. Rule is made absolute in terms of prayer clause (a). No order as to costs.

. Parties to act on the copy of this order duly authenticated by the Sheristedar / Personal Secretary of this Court as true copy.

. Certified copy expedited.